UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NOAH'S ARK PROCESSORS, LLC
D/B/A WR RESERVE

and **Case 14–CA–255658**

UNITED FOOD AND COMMERICAL WORKERS
LOCAL UNION NO. 293

William F. LeMaster* and *Julie Covel, Esqs.,
for the General Counsel.
Jerry L. Pigsley, Esq. (Woods Aiken LLP),
for the Respondent.
Frederick Zarate, Esq. (Blake Uhlig PA),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in December 2020 and January 2021. The complaint alleged that Noah's Ark Processors, LLC d/b/a WR Reserve (NAP or the Respondent) violated §§8(a)(1) and (5) of the National Labor Relations Act (the Act) by: bargaining in bad faith while negotiating a successor contract with the United Food and Commercial Workers Local Union No. 93 (the Union); and then implementing a final offer, absent a valid, good faith, impasse. On the record, I make the following

FINDINGS OF FACT[1]

I. Jurisdiction

NAP owns and runs meat processing plant in Hastings, Nebraska (the plant). It annually sells and ships products worth over $50,000 directly outside of Nebraska. It is, thus, engaged in commerce under §2(2), (6), and (7) of the Act. The Union is a §2(5) labor organization.

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

II. UNFAIR LABOR PRACTICES

A. Introduction

1. Purchase of the Plant

In January 2015, the Nebraska Prime Group sold the plant to NAP, which seamlessly continued its meat processing operations and adopted the extant collective-bargaining agreement that ran from January 28, 2013 to January 28, 2018 (the CBA). (JT. Exhs. 2, 33). The CBA covered the following appropriate bargaining unit of plant employees (the Unit):

> All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska plant, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(JT Exh. 2).

2. Prior Litigation

Following the January 28, 2018 expiration of the CBA, NAP and the Union met for negotiations. NAP sabotaged these negotiations by bargaining in bad faith and unlawfully implementing a final offer absent a valid impasse. These actions prompted a round of Board and Federal Court litigation, where NAP was repeatedly found to have violated the Act.

i. §10(j) Injunction, Contempt Order and Sanctions

On May 10, 2019, the U.S. District Court of Nebraska issued a §10(j) injunction, which ordered NAP to, inter alia, cease: firing workers for their Union activities; refusing to provide information to the Union; making unilateral changes; bargaining in bad faith; and imposing a final offer absent a valid impasse. NAP was, accordingly, ordered to: make reinstatement offers; supply the requested information; bargain in good faith according to a set schedule; give the Union notice and an opportunity to bargain over contemplated changes to the Unit's terms and conditions of employment; and, upon request, rescind the unilateral changes implemented under its unlawful final offer dated January 2, 2019 (the first final offer). (JT Exhs. 4, 8).

Somewhat surprisingly, the §10(j) injunction was insufficient to move NAP to bargain in good faith. Its recalcitrance prompted the General Counsel (the GC) to pursue a contempt finding and connected sanctions. On October 17, 2019, NAP was found in contempt of the §10(j) Order and, on November 1, 2019, sanctions were imposed. (JT Exhs. 9–10).

ii. Board Order

On January 27, 2021, the Board issued a *Decision and Order* in *Noah's Ark Processors, LLC d/b/a WR Processors*, 370 NLRB No. 74 (2021) (*NAP I*), and held, inter alia, that NAP violated §§8(a)(1), (3), and (5) and 8(d) by: failing to provide information; failing to deduct and

remit Union dues; making unilateral changes; firing workers for their Union activities; bargaining in bad faith; and declaring impasse and imposing a final offer absent a valid impasse.

B. Collective Bargaining

On November 5, 2019, following the U.S. District Court's issuance of sanctions, NAP solicited the Union to continue bargaining. (JT Exh. 15). The parties held seven bargaining sessions, before NAP again prematurely declared impasse and implemented an invalid final offer.

1. November 11, 2019 Meeting[2]

The Union was represented by these officers and business agents: Eric Reeder, April Guerrero, Rodney Brejcha, and Carmen Perez. NAP was represented by Chief Executive Officer Fischel Ziegelheim and attorney Jerry Pigsley. Their meeting is summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)[3]	NAP proposed deleting "maintenance employees and shag drivers" from the CBA's unit description. ***This article remained open.***
Art. 2, *Maintenance of Memb./Dues* (ER 2, U 1)	NAP proposed adding, "Union agrees that an employee may at any time contact the Company's HR Department to withdraw from the Union and cease having Union dues withheld from the employee's pay." The Union proposed adding that NAP would provide a weekly membership list and other related data. ***This article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	The Union proposed moving, "employees must pass probation to enjoy benefits," to Art. 17, and rephrasing it to, "employees must pass probation to be eligible for health benefits." ***This article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	NAP proposed deleting grievance steps 3 and 4, and binding arbitration; the Union countered with a streamlined grievance procedure retaining arbitration. ***This article remained open.***[4]
Art. 5, *Bulletin Bd.* (ER 4)	NAP proposed removing the Union's "glassed-in" bulletin board enclosure. ***This article remained open.***[5]
Art. 6, *Injury* (ER 5)	NAP proposed deleting the article, which gave notice to the Union about workplace injuries and deaths. ***This article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	NAP proposed deleting the entire article. The Union proposed adding that a worker, who identifies an unsafe condition, can refuse their assignment until it is remedied. ***This article remained open.***
Art. 8, *Vacation* (E 7, U 6–8)	NAP proposed deleting leave days, while Union proposed adding days. ***This article remained open.***[6]
Art. 9, *Holidays* (ER 8, U 9–14)	NAP proposed eliminating holiday overtime pay and other benefits, while the Union sought increases. ***This article remained open.***[7]

[2] The parties previously met for bargaining for less than an hour on August 6, 2019. (GC Exh. 4). Very little, if any, progress was made at that time; NAP mostly reiterated its earlier bargaining stance. (Id.); see also (JT Exh. 4).

[3] ER 1 stands for NAP bargaining proposal 1, whereas U 1 stands for Union bargaining proposal 1.

[4] ER 3 was more regressive than the first final offer, which did seek to not eliminate arbitration. Although NAP cited some difficulty finding local arbitrators, this unavailability was not a new issue and it otherwise failed to explain the motivation behind this proposal.

[5] ER 4 was more regressive than the first final offer, which did not seek to remove the glass enclosure. NAP failed to explain its rationale.

[6] ER 7 was more regressive than the first final offer, which did not cut vacation benefits. NAP failed to explain its new position.

[7] ER 8 was more regressive than the first final offer, which cut holiday overtime. NAP failed to explain its new position.

Article	Parties' Positions
Art. 10, *Hours* (ER 9, U 15–17)	NAP proposed eliminating call-in and temporary job transfer benefits. The Union proposed, inter alia, increasing minimum call-in hours. ***This article remained open.***[8]
Art. 11, *Military Service*	~~No changes to this article were proposed at this session by either party~~.[9]
Art. 12, *Rates of Pay Provision* (ER 10)	NAP sought to eliminate all language setting pay rates, and replacing it with, "Union recognizes management's right to increase pay without the agreement of the Union." The Union stated that its wage proposal would be later provided. ***This article remained open.***
Art. 13, *Subcontracting* (ER 11)	NAP proposed deleting the Union's subcontracting protections, and replacing it with, "Union recognizes management's right to subcontract any existing operations." ***This article remained open.***[10]
Art. 14, *Extra Work* (ER 12)	NAP proposed eliminating the equitable distribution of extra work opportunities, and replacing it with, "Union recognizes management's right to assign extra work opportunities." The Union did not propose any changes. ***This article remained open.***[11]
Art. 15, *Non-discrimination* (U 18, 19)	The Union proposed an update to include sexual preference, sexual identity and genetic information. ***This article remained open.***
Art. 16, *Co. and Union Resp.*	~~No changes to the no-strike, no-lockout provision were proposed.~~
Art. 17, *Seniority* (ER 13, U 20–22)	NAP sought to eliminate bargaining unit seniority, which factored into job bids. The Union proposed to shorten probation and change the application of seniority. ***This article remained open.***[12]
Art. 18, *Rest Periods* (U 23–24)	The Union proposed creating a paid 15-minute break and timing breaks during set daily windows. ***This article remained open.***
Art 19, *Funeral Leave* (U 25)	The Union proposed changing funeral leave from 7.5 to 8 hours. ***This article remained open.***
Art. 20, *Leave of Absence* (ER 14)	NAP proposed eliminating leaves of absence for the Union convention. ***This article remained open.***[13]
Art. 21, *Plant Visitation* (ER 15)	NAP proposed eliminating the article, which gave the Union the right to visit the plant and replacing it with, "Union recognizes management's right to allow Union officers and representatives to visit locations designated by Company management." ***This article remained open.***
Art. 22, *Safety Equip. and Knives*	~~No changes to this article were proposed at this session by either party.~~
Art. 23, *Misc.* (ER 16)	NAP proposed deleting the 12-hour workday cap and replacing it with the "Union recognizes management's right to assign work in excess of twelve (12) hours a day." ***This article remained open.***[14]
Contract Duration (ER 17, U 26)	NAP proposed a 5-year term, while the Union stated that its proposal would be submitted at a later session. ***This article remained open.***
Job Listings and Pay Rates (U 27)	The Union stated that its job listings and rates of pay proposal would be submitted at a later session. ***This issue remained open.***
401K Plan (U 28)	The Union proposed creating a 401(K) plan, with an employer match. It reserved its right, however, to offer plan details at a later session. ***This issue remained open.***
Seniority Lists (U 29)	The Union proposed that NAP would provide a weekly new hire and termination list, and monthly seniority list. ***This issue remained open.***

[8] ER 9 was more regressive than then first final offer, which never reduced these benefits. NAP failed to explain its new position.

[9] The strikethrough denotes resolved issues, agreements to leave the CBA unchanged, or tentative agreements.

[10] ER 11 was more regressive than the first final offer, which never ended subcontracting rights. NAP failed to explain its new position.

[11] ER 12 was more regressive than the first final offer, which never changed extra work procedures. NAP failed to explain its new position.

[12] ER 13 was more regressive than the first final offer, which never eliminated bargaining unit seniority. NAP failed to explain its new position.

[13] ER 14 was more regressive than the first final offer, which never ended such leaves. NAP failed to explain its new position.

[14] ER 16 was more regressive than the first final offer, which never remove this hourly limitation. NAP failed to explain its new position.

Article	Parties' Positions
Temp. Vacancies (U 30)	The Union proposed a revised temporary vacancy procedure. ***This issue remained open.***
Hours of Work (U 31)	The Union proposed a guaranteed 36-hour workweek. ***This issue remained open.***
Plant Studies (U 32)	The Union sought to perform plant studies with advanced notice. ***This issue remained open.***

(JT 26).

In sum, although the parties agreed to leave articles 11 and 22 unchanged, all other proposals (i.e., ER 1–17 and U 1–32) remained open at the end of the session. NAP's opening proposal was noteworthy because 10 of 17 its proposals were substantially more regressive than the proposals contained in its unlawful first final offer from less than a year before. Given that NAP never explained the changed circumstances that warranted it seeking greater cutbacks, it is difficult to see how it rationally believed that its opener might induce fruitful bargaining.

2. November 18, 2019 Meeting

The Union was represented by Reeder, Guerrero, Brejcha and Perez. NAP was represented by Ziegelheim and Pigsley. Their discussions are summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	No change in position; ***article remained open.***
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	The Union countered NAP's proposal to delete grievance steps 3 to 4 and arbitration, with a streamlined grievance and arbitration procedure. Following NAP's rejection of this counter, the Union countered with retaining the status quo, which NAP rejected.[15] ***This article remained open.***
Art. 5, *Bulletin Bd.* (ER 4)	~~NAP withdrew its proposal.~~
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***[16]
Art. 7, *Safety* (ER 6, U 4, 5)	NAP countered with creating a safety committee; the Union further modified its position. ***This article remained open.***
Art. 8, *Vacation* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***

[15] The Union protested that, because the CBA had a no-strike, no-lockout provision, it needed arbitration because it would be otherwise powerless to strike during the CBA's term to redress unilateral changes. Although NAP replied that the Union could seek redress by filing a breach of contract action in state court (JT Exh. 27), its position was misleading, given that such a state suit would be preempted under established precedent. See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

[16] NAP responded to a question about this proposal, but, no obvious bargaining occurred.

Article	Parties' Positions
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***

(JT Exhs. 26–27).

In sum, at the close of the session, with the exception of NAP's withdrawal of ER 4, the number of open proposals remained unchanged. Other proposals were mostly flatly rejected with little discussion. The parties solely exchanged ideas and modified their positions on Article 4, *Grievance Procedure*, Article 5, *Bulletin Board* and Article 7, *Safety*. They left with an agreement on a single easy item, i.e., leaving the Union bulletin board locked.

3. November 26, 2019 Meeting

The Union was represented by Reeder, Guerrero, and Perez. NAP was represented by Pigsley. Their discussions are summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	No change in position; ***article remained open.***
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	Union proposed another change; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	NAP made a counter, which sought to grant it the right to assign Unit work to non-unit foremen and afford it more control to change work rules.[17] The Union's proposals were unchanged; ***article remained open***.
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	Some progress was made, with both NAP and the Union offering reasonable counters; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***

[17] NAP never sought to reduce these benefits in its first final offer. It failed to explain the necessity or timing of this deeper cutback.

Article	Parties' Positions
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	NAP proposed a new article, *Waiver, Entire Agreement and Severability*,[18] and the Union countered that the, "general waiver is null and void with respect to any mandatory subject of bargaining." ***This article remained open.***
Misc. – Respect for Workers (U 33)	Union proposed a new article, *Respect for Workers,* ***which remained open.***
Misc. – Health Insurance Coverage (U 35)	Union proposed a health insurance plan with details to be supplied at a later session; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	Union proposed a full-time walk around steward; ***article remained open.***

(JT Exhs. 26–28).

In sum, although the parties made some limited progress on Art. 15, *Non-discrimination*, they made little progress on anything else. It is unclear if they discussed their other proposals beyond reiterating earlier rejections. There is no evidence of the parties offering counterproposals, even on seemingly de minimis items. NAP even went in the opposite direction of progress, and added two newly regressive proposals (i.e., management rights and waiver proposals).

4. December 9, 2019 Meeting

F.M.C.S. Commissioner Ron Morrison attended. The Union was led by Reeder, Perez and Brejcha. NAP was led by Pigsley and Prager. Their discussions are summarized below:

Article	Parties' Positions
Art. 1, *Recognition* (ER 1)	~~The parties reached a tentative agreement (TA) to exclude shag drivers from the Unit.~~
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	Union proposed an added change, while the parties' prior positions remained unchanged; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	~~Union withdrew U 9~~; ***article otherwise remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 15, *Non-discrimination* (U 18, 19)	~~The parties reached a TA on a revised article.~~
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	Union modified its position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***

[18] NAP never sought to reduce these benefits in its first final offer. It failed to explain the necessity or timing of this deeper cutback.

Article	Parties' Positions
Job Listings and Pay Rates (U 27)	Union's wage proposal to be subsequently submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be subsequently submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***
Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

(JT Exhs. 26–29).

In sum, although the parties resolved Articles 1 and 15, they made little progress on anything else. Agreements on Articles 1 and 15 were expected, given that the parties only agreed to exclude shag drivers from a Unit where they no longer existed and agreed to incorporate non-discrimination legislation that NAP was already required to follow. The parties left this session with a whopping 50 open proposals and an ongoing parade of flat rejections.

5. December 10, 2019 Meeting

The Union was represented by Reeder, Perez and Brejcha. NAP was represented by Pigsley and Junker. These negotiations are summarized below:

Article	Parties' Positions
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	NAP proposed dividing Unit jobs into these categories: light ($12/hour); medium ($13/hour); medium/heavy ($14/hour); heavy ($15/hour); and super heavy ($16/hour). The Union rejected this proposal. There were no additional changes in the parties' positions; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art. 18, *Rest Periods* (U 23–24)	~~The parties reached a TA on a revised article.~~
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	No change in position; ***article remained open.***
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be later submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be later submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***

Article	Parties' Positions
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***
Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***[19]
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

(JT Exhs. 26–30).

In sum, while the parties reached a TA on the Rest Periods article, a host of major labor relations issues (e.g., wages, health insurance, retirement benefits, contract duration, and grievance-arbitration) remained. Once again, there was little to no accompanying discussion on these bargaining subjects.

6. December 17, 2019 Meeting

The Union was represented by Schwisow and Perez. NAP was represented by Pigsley. These negotiations are summarized below:

Article	Parties' Positions
Art. 2, *Maint. of Memb./Dues* (ER 2, U 1)	No change in position; ***article remained open.***
Art. 3, *Mgmt. Rights* (U 2, 3)	No change in position; ***article remained open.***
Art. 4, *Grievance Procedure* (ER 3)	No change in position; ***article remained open.***
Art. 6, *Injury* (ER 5)	No change in position; ***article remained open.***
Art. 7, *Safety* (ER 6, U 4, 5)	No change in position; ***article remained open.***
Art. 8, *Vacation Proced.* (E 7, U 6–8)	No change in position; ***article remained open.***
Art. 9, *Holidays* (ER 8, U 9–14)	No change in position; ***article remained open.***
Art. 10, *Hours of Work* (ER 9, U 15–17)	No change in position; ***article remained open.***
Art. 12, *Rates of Pay Provision* (ER 10)	No change in position; ***article remained open.***
Art. 13, *Subcontracting* (ER 11)	No change in position; ***article remained open.***
Art. 14, *Extra Work* (ER 12)	No change in position; ***article remained open.***
Art. 17, *Seniority* (ER 13, U 20–22)	No change in position; ***article remained open.***
Art 19, *Funeral Leave* (U 25)	No change in position; ***article remained open.***
Art. 20, *Leave of Absence* (ER 14)	~~The parties reached a TA; ***this article was resolved.***~~
Art. 21, *Plant Visitation* (ER 15)	No change in position; ***article remained open.***
Art. 23, *Misc.* (ER 16)	No change in position; ***article remained open.***
Contract Duration (ER 17, U 26)	No change in position; ***article remained open.***
Job Listings and Pay Rates (U 27)	Union's wage proposal to be later submitted; ***article remained open.***
401K Plan (U 28)	Union's 401K proposal to be later submitted; ***article remained open.***
Seniority Lists (U 29)	No change in position; ***article remained open.***
Temp. Vacancies (U 30)	No change in position; ***article remained open.***
Hours of Work (U 31)	No change in position; ***article remained open.***
Plant Studies (U 32)	No change in position; ***article remained open.***
Misc. – Waiver	No change in position; ***article remained open.***
Misc. – Respect for Workers (U 33)	No change in position; ***article remained open.***
Misc. – Health Insurance Coverage (U 35)	No change in position; ***article remained open.***
Misc. – Walk-Around Steward (U 36)	No change in position; ***article remained open.***

[19] At this session, the Union reported that is International affiliate could provide health insurance coverage for the unit.

(JT Exhs. 26–31). In sum, this session solely yielded the resolution of Art. 20, *Leave of Absence*.

7. January 13, 2020 Meeting

The Union was led by Brejcha, while NAP was led by Pigsley. After some limited discussion, NAP declared impasse and presented a final offer (the second final offer):[20]

Clause	Final Offer
Art. 1, *Recognition*	The TA was included; the rest of the article was left unchanged.
Art. 2, *Maintenance of Memb./Dues*	ER 2 (i.e., adding that the, "Union agrees that an employee may at any time contact the Company's HR Department to withdraw from the Union and cease having Union dues withheld from the employee's pay.") was added; U 1 and 34 were rejected; and the rest of the article was unchanged.
Art. 3, *Mgmt. Rights*	The status quo was retained; U 2 (i.e., "Employees must pass probation to be eligible for benefits.)" was incorporated in the *Seniority* article; and U 3, which was not withdrawn, was rejected.
Art. 4, *Grievance Procedure*	ER 3 (i.e., deleting grievance steps 3 and 4, and binding arbitration) was implemented, while the rest of the article was left unchanged.
Art. 5, *Bulletin Bd.*	ER 4 was withdrawn, and the article was left unchanged in accordance with the parties' prior agreement.
Art. 6, *Injury*	ER 5 (i.e., which deleted the article, including the Union's right to be notified of workplace injuries and deaths, and right to investigate) was implemented.
Art. 7, *Safety*	ER 6 (i.e., which deleted the entire article) was implemented, while U 4 and 5 were rejected.
Art. 8, *Vacation*	ER 7 (i.e., which deleted additional vacation for 4 and 5 years of service) was implemented, while U 6 through 8, which were not withdrawn, were rejected.
Art. 9, *Holidays*	ER 8 (i.e., which eliminated overtime for holiday hours worked and other holiday benefits) was implemented, while U 10 through 14, which were not withdrawn, were rejected.
Art. 10, *Hours of Work*	ER 9 (i.e., which deleted the entire article, including minimum call-in hours and premium pay for temporary transfers) was implemented, while U 15 through 17, which were not withdrawn, were rejected.
Art. 11, *Mil. Serv.*	The current article was retained, as per the parties' prior agreement.
Art. 12, *Rates of Pay Provision*	ER 10 (i.e., which provided, inter alia, that the "Union recognizes management's right to increase pay without the agreement of the Union" and set these rates/job categories: light ($12/hour), medium ($13/hour), medium/heavy ($14/hour), heavy ($15/hour) and super/heavy jobs ($16/hour)) was implemented. The Union was never given the opportunity to advance a wage proposal, although it had previously stated that it intended to at a later session, after lesser issues and non-economic matters were first addressed.
Art. 13, *Subcontracting*	ER 11 (i.e., which deleted the article and replaced it with the, "Union recognizes management's right to subcontract any existing operations") was implemented.
Art. 14, *Extra Work*	ER 12 (i.e., which deleted the article and replaced it with the, "Union recognizes management's right to assign extra work opportunities") was implemented.
Art. 15, *Non-discrimination*	The TA was implemented.
Art. 16, *Co. and Union Resp.*	The status quo article was retained in the final offer.
Art. 17, *Seniority*	Although ER 13 initially proposed deleting the entire article, the final offer only deleted the second paragraph of the article, which, inter alia, used department seniority for awarding vacancies. The final offer added this sentence, "employees must pass probation to be eligible for benefits," which the parties had agreed-upon. The final offer rejected U 20 to 22, which proposed, inter alia, changing the probationary period and bid procedures, and was not withdrawn.
Art. 18, *Rest Per.*	The TA was incorporated in the final offer.
Art 19, *Funeral Lv.*	The status quo article was retained in the final offer; U 25 (i.e., which proposed changing the funeral leave benefit from 7.5 to 8 hours, and was never withdrawn) was rejected.

[20] It is notable that NAP presented the Union with an unmarked copy of its final offer, which appeared as a draft contract. Its version made it extremely difficult to pinpoint and appreciate its exact CBA modifications.

Clause	Final Offer
Art. 20, *Lv. of Absence*	The TA was implemented.
Art. 21, *Plant Visit.*	ER 15 (i.e., which deleted the Union's right to visit the plant for, inter alia, grievances and safety, and replaced it with the, "Union recognizes management's right to allow Union officers and representatives to visit locations designated by Company management") was implemented.
Art. 22, *Safety Equip. and Knives*	The TA was implemented.
Art. 23, *Misc.*	ER 16 (i.e., which deleted the employees' rights to not work over 12 hours per day and replaced it with the "Union recognizes management's right to assign work in excess of twelve (12) hours a day") was implemented.
Art. 24, *Term of the Agreement*	ER 17 (i.e., which created a 5-year contract) was implemented. The Union never advanced a contract duration proposal; it stated that it intended to advance a duration proposal in tandem with its wage proposal at a later bargaining session, after various lesser issues and non-economic matters were addressed.
~~Misc. – Job Listings and Pay Rates~~	~~U 27 (i.e., which sought to propose revised job listings and wages at a later session) was rejected.~~
~~Misc. – 401K Plan~~	~~U 28 (i.e., which sought to propose the creation of a 401K plan for the unit at a later session) was rejected.~~
~~Misc. – Seniority List~~	~~U 29 (i.e., which sought Noah's Ark's commitment to provide the Union with a weekly new hire and termination list, and monthly seniority list) was rejected.~~
~~Misc. – Temporary Vacancies~~	~~U 30 (i.e., which sought to revise the process for filling temporary vacancies) was rejected.~~
~~Misc. – 36 Hour Workweek~~	~~U 31 (i.e., where the Union proposed that full-time employees be guaranteed 36 hours of work per week) was rejected.~~
~~Misc. – Plant Studies~~	~~U 32 (i.e., where the Union proposed conducting studies at the plant) was rejected.~~
~~Misc. – Waiver~~	~~ER 18 (i.e., which added a *Waiver, Entire Agreement and Severability* article) was implemented, while the Union's counterproposal was rejected.~~
~~Misc. – Respect for Workers~~	~~U 33 (i.e., which proposed creating a new article legislating respect for workers) was rejected.~~
~~Misc. – Health Insurance Coverage~~	~~U 35 (i.e., which proposed granting health insurance coverage to the unit, but, was never discussed because it was tabled to a later point in bargaining) was rejected.~~
~~Misc. – Walk-Around Steward~~	~~U 36 (i.e., which sought to create a full-time, walk-around steward) was rejected.~~

(JT Exhs. 26–32); see also (GC Exh. 5).

III. ANALYSIS

A. Bad Faith Bargaining over the Successor CBA

NAP bargained in bad faith over the successor CBA. The Act requires an employer to meet with a union "at reasonable times," and confer in good faith over the bargaining unit's "wages, hours and other terms and conditions of employment." Good faith means negotiating with the "sincere purpose to find a basis of agreement," which includes reasonable efforts to compromise. *Regency Service Carts, Inc.*, 345 NLRB 671 (2005); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Although good faith does not require capitulation, it does require an obvious and ongoing effort "to settle differences and arrive at an agreement." *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). The "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation" does not suffice (i.e., just going through the motions). *Id.* The Board employs a "totality of the circumstances" test to gauge a good faith, which weighs these factors: the reasonableness of bargaining demands; delays; efforts to bypass the union; refusals to provide information; unilateral changes; failing to

designate an agent with bargaining authority; withdrawing prior agreements; arbitrary scheduling; and other unlawful conduct. *Atlanta Hilton & Tower*, supra. I find that several bad faith factors are present herein.

1. Factor 1 – Deeply Regressive Proposals

The consistently regressive nature of NAP's proposals strongly suggests bad faith. Or put another way, NAP's bargaining demands were unreasonable. *First*, it demonstrated bad faith when it sought to slash virtually every benefit and workplace protection contained in the CBA. Its second final offer deleted, inter alia, binding arbitration, workplace injury investigation rights, the whole *Safety* article, greater leave for senior workers, premium pay for call-ins, subcontracting protections, extra work procedures, plant visitation rights, a 12-hour workday cap and, perhaps most importantly, the Union's right to negotiate over, and consent to, mid-contract pay adjustments. It effectively offered the Union a deal that no self-respecting labor organization could take. *Second*, it further demonstrated bad faith because, when taken as a whole, it was really offering the Union a worse landscape with a contract than it would have possessed without a contract.[21] *Third*, the egregiousness of its position was magnified by its consistent failure to even offer a rationale for its deeply regressive slate of proposals.[22] See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (where a proponent of a regressive proposal fails to provide a legitimate explanation for such a proposal, it is indicative of a failure to bargain in good faith); *John Asquaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nom. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992). *Fourth*, its second final offer was even more regressive than its first final offer, which was held to have been made in bad faith; once again no explanation was offered for this anomaly.[23] *Atlanta Hilton & Tower*, supra; *Houston County Electric Cooperative*, 285 NLRB 1213, 1214 (1987) (tactics "designed to frustrate bargaining" are "an indicium of bad-faith bargaining").[24]

---

[21] For example, the combined effect of ER 12's granting to NAP of the right "to increase pay without the agreement of the Union," ER 3's deletion of arbitration, the continuation of the no-strike clause, and ER 18's comprehensive *Waiver, Entire Agreement and Severability* article, meant that the Union would be powerless to challenge NAP's decision to adjust wages during the contract's term. This scenario is vastly worse than having no CBA at all because, absent a contract, the Union would still be entitled to pre-implementation notice and bargaining over wages. By way of further example, without a contract, the Union would retain the right to pre-implementation notice and bargaining over most instances of subcontracting. See generally *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964); *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). The combined effect, however, of ER 11's express grant "to subcontract any existing operations, ER 3's elimination of arbitration, and ER 18's comprehensive *Waiver, Entire Agreement and Severability* article meant that the Union would now be powerless to stop NAP from subcontracting and eviscerating the entire Unit at will. Without exercising a great deal of creativity, many additional examples of this principle could be listed, with each eviscerating the Union in a unique way.

[22] As a threshold matter, beyond NAP saying that it was unable to procure a local Nebraska arbitrator, it wholly failed to justify why it needed to completely end arbitration in a workplace that rarely had any arbitrations. It's also flatly unreasonable that the short supply of Nebraska arbitrators meant that NAP needed to reject the arbitral institution in its entirety. In addition, it never explained why it needed to eliminate the Union's subcontracting, health and safety rights, as well as host of other important procedures, benefits and protections for its employees. Explanation and discussion is a key element to bargaining, and NAP's derogation of these duties smacked of bad faith.

[23] As noted, even though only a year passed between NAP's first and second final offers, it newly sought even deeper cutbacks in Arts. 3, 7, 8, 9, 10, 13, 14, 17, 20 and 23, even though its first final offer never previously sought to amend the same portions of these articles.

[24] "Regressive bargaining … is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp*., 331 NLRB 223, 225 (2000), enfd. 26 Fed.Appx. 435 (6th Cir. 2001), citing *McAllister Bros*., 312 NLRB 1121 (1993).

2. Factor 2 – Unwillingness to Consider Even Minor Changes

NAP's ongoing refusal to consider even the Union's most innocuous proposals, without explanation, reveals bad faith. The Board considers an employer's refusal to consider a union's proposals, without explanation, to be a factor demonstrating bad faith. *Mid-Continent Concrete*, supra, 336 NLRB at 260. In this case, NAP flatly rejected U 1, even though it only sought a membership list and related data, which was readily available at little expense and an abundantly reasonable demand, and U 33, even though the Union only wanted a pro forma pledge about workplace respect. Agreeing to U 1 and U 33 would have been cost-free gestures of good will, without any actual labor relations impact; NAP's rejection of easy giveaways suggested bad faith.

3. Factor 3 – General Unwillingness to Consider Most Other Union Proposals

NAP's refusal to consider the Union's other proposals, without discussion, supports a bad faith finding. Although the Union made proposals on a range of key Unit issues (e.g., safety (U 4–5), vacation (U 6–8), holiday (U 9–14), hours of work (U 15–17) and seniority (U 20–22)), NAP flatly dismissed these issues, without a single counter. Although NAP was never obligated to capitulate to any specific demands, its decision to cursorily dismiss these proposals, without even a reasonable exploration of the Union's goals, its priorities and the potential common ground, demonstrated bad faith.

4. Factor 4 – Adoption of Most of its Own Initial Proposals Without Modification

NAP's implementation of so many of its own highly regressive proposals, without any discourse or retreat from its original position, demonstrated bad faith. NAP repeatedly advanced its highly regressive slate without alteration, compromise or rationale, while summarily rejecting the Union's ideas on the same topics. *Atlas Guard Service*, 237 NLRB 1067, 1079 (1978) (violation where employer would only reach agreement on its own terms). This "my way or the highway" approach suggested bad faith.

5. Factor 5 – Unwillingness to Wait for the Union to Make All of its Proposals

NAP's bad faith was also exhibited by its unwillingness to even wait for the Union to advance its full slate of proposals. Throughout bargaining, the Union told NAP that it intended to advance its wage (U 27), 401K plan (U 28) and health insurance (U 35) proposals at a later session, after the parties culled through several more resolvable proposals with lesser economic impact.[25] NAP's unwillingness to hold off on declaring an impasse before it actually heard everything that the Union had to say was bad faith. *Atlanta Hilton & Tower*, supra. There was simply no valid reason why NAP could not wait to at least hear the Union's position on these key issues, and gauge if there was any commonality in their stances.

[25] Collective bargainers often categorize proposals into economic and non-economic categories, in an effort to try to first resolve non-economic matters before tackling more difficult economic ones that might be bargained over in the context of an overall labor relations budget. The Union's efforts to try to work through bargaining in this manner was rational.

6. Factor 6 – NAP's Wage Proposal

NAP's pursuit of an unlawful wage proposal further demonstrated bad faith. Wage proposals (e.g., merit pay proposals) that do not contain definable objective procedures and criteria for their application are unlawful. *Royal Motor Sales*, 329 NLRB 760, 779–81 (1999), enfd., 2 Fed. Appx. 1 (D.C. Cir. 2001) (promotions and raises based on "ability and performance" without defining objective criteria for assessing those factors and without established maximum amounts for raises too discretionary); *McClatchy Newspapers*, 321 NLRB 1386, 1390–91 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997) (merit raises based on performance without defined criteria for evaluations and parameters for amounts was unlawful); *Colorado-Ute Elec. Ass'n*, 295 NLRB 607, 609–610 (1989), enf. denied, 939 F.2d 1392 (10th Cir. 1991) (merit raises based on performance without defined criteria for assessment and parameters for amounts are too discretionary). In the instant case, the wage proposal that NAP implemented lacked any objective criteria for assessing the factors that warranted a raise and lacked parameters for such raises (e.g., it broadly stated, "Union recognizes management's right to increase pay without the agreement of the Union" without providing any connected criteria). It was, as a result, too discretionary and unlawful. NAP's prosecution of this unlawful wage proposal further demonstrated bad faith.[26]

7. Synthesis

I find, accordingly, that NAP bargained in bad faith. *Public Service Co. of Oklahoma*, 334 NLRB 487, 488–490 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Mid-Continent Concrete*, supra at 261 (relying upon the several bad faith factors present herein). Although NAP argues that its willingness to reach a few tentative agreements demonstrated good faith, this argument is misplaced. Its tentative agreements involved "low-hanging fruit" (e.g., agreeing to leave a bulletin board locked, incorporating anti-discrimination laws into the contract, moving previously agreed-upon language around, etc.), which hardly exculpated NAP's other instances of bad faith.

B. Unlawful Impasse

NAP's bad faith bargaining during contract negotiations precluded it from reaching a valid impasse with the Union. The absence of a valid, good faith, impasse estopped NAP from lawfully implementing its second final offer. In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board held that a valid bargaining impasse occurs when, "good-faith negotiations have exhausted the prospects of concluding an agreement." In *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973) enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974), the Board added that:

[26] This factor supplements the already strong conclusion that NAP bargained in bad faith, but, is not outcome determinative. Thus, even if this wage issue were not considered, a bad faith finding would be persuasively supported by the several other bad faith factors cited herein.

> [A] genuine impasse in negotiations is synonymous with a deadlock [where] the parties have discussed the … subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The question of whether a valid impasse exists is a "matter of judgment," where these factors are relevant: "bargaining history, good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, supra at 478. It is insufficient that the party asserting impasse believes that it has been reached; there must be a "contemporaneous understanding" by both that further bargaining would be futile. *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005), enfd. mem. 219 Fed. Appx. 390 (6th Cir. 2007). The burden of demonstrating a good faith impasse rests with the party, who claims its existence. *Serramonte Oldsmobile Inc*., 318 NLRB 80, 97 (1995) enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). An employer, consequently, violates §8(a)(5), when it implements its final bargaining offer in the absence of a valid good faith impasse. *Cotter & Co.*, 331 NLRB 787 (2000).

In the instant case, NAP failed to meet its burden of demonstrating the existence of a valid, good-faith, impasse. *First*, as noted in detail in the bad faith bargaining analysis above, its declaration of impasse was preceded by a pattern of bad faith negotiations, which precluded the parties from reaching a valid, good faith, impasse. *Second*, the parties' bargaining history undercuts NAP's assertion of a good faith impasse. This is a case, where NAP previously bargained in bad faith, unlawfully implemented its first final offer, and then had to be forced to return to the bargaining table via an injunction and contempt action (i.e., it really only went back to the table kicking and screaming). *Finally*, NAP failed to show that there was a "contemporaneous understanding" of impasse by both parties. The Union never believed that the parties were at impasse. And, really, how could there have been an impasse, when NAP failed to even wait for the Union to submit its most important proposals on wages, health insurance and retirement benefits? In sum, NAP failed to meet its burden of proof on this subject; its contention regarding the reaching of a valid impasse is a sham.[27] The absence of a valid impasse, consequently, rendered NAP's imposition of the second final offer unlawful.

CONCLUSIONS OF LAW

1. NAP is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization.

3. At all times material herein, the Union has been the designated bargaining

[27] NAP's contention that a valid impasse was reached in the face of its ongoing pattern of bad faith and recent quadfecta of losses on the very same issues before the Board and the U.S. District Court exhibits an almost comical level of chutzpah. Chutzpah is eloquently defined as "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." LEO ROSTEN, THE JOYS OF YIDDISH (1968).

representative of NAP's employees in the following appropriate unit:

> All production, maintenance, shag drivers and distribution employees employed at its Hastings, Nebraska facility, but, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

4. At all material times, NAP has recognized the Union as the exclusive bargaining representative of the employees in the unit described above.

5. NAP violated §8(a)(5) by:

a. By failing and refusing to bargain in good faith with the Union while negotiating a successor agreement.

b. Implementing a last, best and final offer in negotiations without reaching a valid, good-faith, bargaining impasse with the Union.

6. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

REMEDY

Having found that NAP committed unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that NAP violated §8(a)(5) by refusing to bargain in good faith, it shall meet, on request, with the Union and bargain in good faith over the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed contract. In addition, having found that NAP unlawfully implemented its final offer on January 13, 2020, in the absence of a valid impasse, NAP is directed to reinstitute the terms and conditions of employment that existed before its unlawful changes. It shall also make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), NAP shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

In light of NAP's bad faith bargaining recidivism, it shall hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which time the attached notice, Appendix, is to be read to the employees in both English and Spanish by CEO Fischel Ziegelheim or, at NAP's option, by a Board agent in his presence. Given that Ziegelheim took an active role in bargaining, his presence will promote the message that NAP will now comply

with the Act and bargain in good faith, which will help assure workers that their §7 activities are not an act of futility.

NAP shall reimburse the Union for its negotiating expenses that were incurred from November 11, 2019 until such time as NAP begins bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses. *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 NLRB 1125 (1998)(an order requiring a respondent to reimburse a charging party for negotiation expenses is warranted in cases of unusually aggravated misconduct, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies).

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), an affirmative bargaining order is warranted herein, as the "traditional, appropriate" remedy for NAP's unlawful failure and refusal to bargain in good faith. *Id*. at 68. An affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000).

Regarding factor 1, an affirmative bargaining order would vindicate the §7 rights of the Unit employees who have been repeatedly denied the benefits of collective bargaining by NAP's unlawful conduct. NAP's surface bargaining, repeated efforts to frustrate the negotiating process and unlawful implementation of the second final offer has unlawfully deprived the Unit of the chance to secure the stability of a collective-bargaining agreement. An affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, will advance the §7 rights of employees who have been deprived of the benefits of the collective-bargaining process, without undue prejudice to the §7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Factor 1, accordingly, weighs heavily in favor of an affirmative bargaining order.

Regarding factor 2, an affirmative bargaining order would advance the Act's policies by fostering meaningful collective bargaining and industrial peace. It would remove NAP's incentive to delay bargaining and foster greater Union disenfranchisement. It would ensure that the Union will not be pressured by NAP's failure to bargain in good faith to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

Regarding factor 3, a cease-and-desist order, in isolation, would be inadequate to remedy NAP's unlawful surface bargaining because it would permit a challenge to the Union's majority status before the taint of the unlawful conduct has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust

in the instant case because the unlawful surface bargaining has caused an undue and prolonged delay in the parties' progress toward achieving a successor agreement. Given that Unit employees may errantly blame the Union, at least in part, for the present situation, an affirmative bargaining order would insulate the Union from a consequence that NAP has singlehandedly caused, and, ideally, prevent disaffection on this basis for a sufficient period. Or put another way, an affirmative bargaining order is necessary to prevent NAP from benefiting from the fruits of its unlawful actions. The imposition of a bargaining order would signal to employees that their rights guaranteed under the Act will be protected. This circumstance outweighs the temporary impact the affirmative bargaining order will have on the rights of employees, who may oppose continued union representation.

For all the foregoing reasons, an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy NAP's bad-faith surface bargaining in this case.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

Noah's Ark Processors, LLC d/b/a WR Reserve its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Bargaining in bad faith with the Union while negotiating a successor agreement.

b. Implementing a last, best and final offer in negotiations without reaching a valid, good-faith, bargaining impasse with the Union.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the Act's policies

a. On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in this appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement:

All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska facility, but, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

[28] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Rescind the changes in the terms and conditions of employment for its unit employees, which were unilaterally implemented under the January 13, 2020 final offer.

c. Make whole eligible employees in the above-described unit for any loss of earnings and benefits resulting from implementing the January 13, 2020 final offer in the absence of a valid impasse, as described in the remedy section.

d. Compensate affected employees for the adverse tax consequences, if any, of receiving a lumpsum awards and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay liability is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

e. Compensate the Union for all bargaining expenses incurred, or to be incurred, from November 11, 2019 through the date that good faith negotiations ultimately begin. Upon receipt of a verified statement of costs and expenses from the Union, NAP shall promptly submit reimbursement to the compliance officer for Region 14 of the National Labor Relations Board, who will document its receipt and forward payment to the Union.

f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

g. Within 14 days after service by the Region, post at its Hastings, Nebraska facility copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 2019.

[29] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

h. Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice, Appendix, is to be read to the employees in both English and Spanish by CEO Fischel Ziegelheim or, at NAP's option, by a Board agent in his presence.

i. Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated Washington, D.C. May 27, 2021

Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT bargain in bad faith with the Union while negotiating a successor agreement.

WE WILL NOT implement a last, best and final offer in negotiations without reaching a valid, good-faith, bargaining impasse with the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in this appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement:

All production, maintenance, shag drivers and distribution employees employed at the Hastings, Nebraska facility, but, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees, which were unilaterally implemented under our January 13, 2020 final offer.

WE WILL make whole, with interest, eligible employees in the above-described unit for any loss of earnings and benefits caused by the unlawful imposition of our January 13, 2020 final offer.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving a lumpsum award associated with our unlawful implementation of our January 13, 2020 final offer, and file with the Regional Director for Region 14, within 21 days of the date the amount

of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL reimburse the Union for their negotiating expenses from November 11, 2019 until such time as we begin bargaining in good faith, upon submission by the Union of a verified statement of costs and expenses.

NOAH'S ARK PROCESSORS, LLC D/B/A WR RESERVE
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

224 South Boulder Avenue, Room 322, Tulsa, OK 74103-3027
(918) 581-7951, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at http://www.nlrb.gov/case/14-CA-255658 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (918) 770-8123.